IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 177 of 2006
In
COMPANY APPLICATION No. 359 of 2006
With
COMPANY PETITION No. 178 of 2006
In
COMPANY APPLICATION No. 360 of 2006
To
COMPANY PETITION No. 179 of 2006
In
COMPANY APPLICATION No. 361 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HARIYANA INDUSTRIAL GASES PVT.LTD. - Petitioner(s)
Versus
. . - Respondent(s)

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Appearance :
MRS SWATI SOPARKAR for Petitioner(s) : 1,
MR HARIN P RAVAL for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 27/08/2007

ORAL JUDGMENT

1. The present petitions are for sanctioning the Scheme of Amalgamation, copy whereof is produced at Annexure “C” in the petitions. The petitioners of Company Petition No.177 of 2006 and Company Petition No.178 of 2006 are the Transferor Companies and the petitioner of Company Petition No.179 of 2006 is the Transferee Company.
2. In Company Petition No.177/2006 pursuant to the order dated 11.7.2006 passed by this Court(Coram: A.S.Dave, J.) in Company Application No.359 of 2006, the meetings of the shareholders and of creditors of the Company were dispensed with.
3. In Company Petition No.178 of 2006 vide order dated 11.7.2006 passed by this Court (Coram: A.S.Dave, J.) in Company Application No.360 of 2006 the meetings of shareholders and of the creditors of the company were dispensed with.
4. In Company Petition No.9 of 2006 pursuant to the order dated 11.7.2006 passed by this Court (Coram: A.S.Dave, J.) in Company Application No.361 of 2006 the meeting of the equity shareholders was ordered to be convened on 21.8.2006 after issuing public advertisements and the

Chairman was ordered to file the report. Pursuant thereto, Mr.Rajeev Reniwal (wrongly typed as Raveev Reniwal), the Chairman appointed for such purpose has filed the affidavit dated 29.8.2006 together with the copy of the proceedings of the meeting showing that the Scheme of Amalgamation is approved by 100% in number and in value of equity shareholders present at the meeting.

5. All the three petitions came to be admitted on 19.9.2006 and it was ordered to advertise in two daily newspapers; Times of India (Ahmedabad Edition) and Sandesh (Bhavnagar Edition) and the publication in the Government Gazette was dispensed with. The notice was ordered to be issued to the Central Government through Regional Director, Department of Company Affairs, Mumbai, and in case of Transferor Companies, the notices were also issued to the Official Liquidator for examination through Chartered Accountant into the affairs of the Company.

6. The affidavit is filed by Mr.Dharmendra Mavjibhai Rathod, Clerk of the learned Advocate, Mrs.Swati Soparkar together with the copy of the paper publication pursuant to the order passed by this Court. As per the affidavit filed

by Rajeev Reniwal, Director of the Transferor Company, no objection is received by the petitioner(s) or their learned advocate in response to the advertisement opposing the Scheme of Amalgamation or otherwise.

7. The Official Liquidator has filed the report dated 7.6.2007 in case of both transferor companies with the report of Mr.P.D.Shah and Associates, Chartered Accountant, whereas of Mr.Vibhakar J. Trivedi and Co., Chartered Accountant in Company Petition No.177 of 2006. It may be observed that in Company Petition No.177 of 2006 in respect to the said transferor company, as per the report, the affairs of the transferor company have not been conducted in the manner prejudicial to the interests of the members or public interest.

8. But in Company Petition No.178 of 2006, vide para 7 of the report of the OL, the Chartered Accountant has made observations, which reads as under:-

> “12.1 That, company has invested an amount of Rs.15 lacs in 0% unsecured non-convertible debenture of Hariyana Ship Demolition Pvt. Ltd. (HSDPL) which was in no way beneficial to the company and the said debentures have been reported to have been sold which resulted in loss of

revenue to the company.

12.2 That, the company has raised its paid up capital by issue of shares of Rs.2,94,50,000/- and that Rs.4,23,75,000/- have been invested in Hariyana Ship Demolition Pvt. Ltd. (HSDPL) for the purpose of acquisition of shares, but the said amount was lying only as share application money for about one year and received back by the company without allotment of any shares in the transferee company which has been reported to be the diversification of fund resulting in to the loss of revenue of Rs.34,64,245/-.

12.3 That, the company has majority income derived from financial activity for which it was required to obtain prior approval of Reserve Bank of India under the provisions of Reserve Bank of India Act 1934 read with directions applicable to the NBFC Companies.

12.5 That, the company has not provided depreciation on assets sold during the year which is not in confirmatory to Schedule-VI of the Companies Act, 1956 and to that extent accounts are not prepared in accordance with Sch. VI of the

Companies Act, 1956.

12.6 That the terms and conditions on which the company has given guarantees for loans taken by others from banks or financial institutions, are not prejudicial to the company. However, Audited Annual Accounts does not reflect any such guarantee as Contingent Liabilities. Further, the petitioner company has also not recorded any such guarantee given given by ITPL to bank/outsiders for loan taken by other party."

9. However, in response thereto the additional affidavit dated 16.7.2007 has been filed by Mr.Rajeev Reniwal and the explanation submitted is at para 3 to 7, which reads as under:-

"3. With regard to the issue raised in paragraph 12.1 of the said report, I state and submit that the loss occurred due to the sale of investment in the debentures of a group company is the result of the commercial wisdom of the management/directors of the company. No adverse inference can be drawn on the basis of the same.

4. With regard to the issue raised in paragraph 12.2 of the said report, I state and submit

that again it is the case of proposed investment in the shares of another group company. In case of non-allocation of the shares, the other company in any case has refunded the money. The same is in no way barred by the applicable provisions of law as Sec. 372A of the Companies Act is not applicable to a private limited company. There is a factual error with regard to the share capital of the Petitioner Company.

5. With regard to the issue raised in paragraph 12.3 of the said report, I state and submit that the contention taken is totally misplaced. The petition itself has explained the objects for which the company was floated and why the circumstances necessitated diversifying. The current activities of the Petitioner Company are conducted in the interest of the company and do not fall in the realm of Non Banking Financial Company. It is not necessary for the company to obtain any permission from the Reserve Bank of India for the same. It being a private limited company, the Board of Directors is empowered to decide the commercial activity to be undertaken by the company and the

same are not outside the scope of the objects clause of its Memorandum of Association.

6. With regard to the issue raised in paragraph 12.5 of the said report, I state and submit that the contention taken is not relevant. The non-provision of depreciation on the assets sold during the year is very negligible amount and the same does not affect the profitability of the company in any way. Further, the said fact is not in any way suppressed by the Petitioner Company as the same is clearly indicated by the statutory auditor of the company in the Balance Sheet of the company as at 31st March 2006 already placed on record as Annex. B to the said petition.

7. With regard to the issue raised in paragraph 12.6 of the said report, I state and submit that the contention taken is irrelevant. The Board of the petitioner company had resolved to execute corporate guarantee if needed. However, no guarantee was actually executed and hence there is no question of showing it as contingent liability in its books."

10.As such, the relevant circumstances for declining the

sanction on the part of the Company Court would be as to whether the affairs of the transferor company were conducted detrimental to the interests of the members i.e. shareholders. None of the shareholders of the company have expressed their opinion or have opposed the scheme of amalgamation, nor have they made any complaint in respect to the functioning of the transferor company. Further, even on the aspect of public interest, it prima facie appears that as per the opinion of the Chartered Accountant, certain statutory requirements are not complied with. However, neither it is stated in the report of the Chartered Accountant, nor has it come on record that the proceedings have been initiated under the relevant provisions of law or the guidelines, as the case may be, for non-compliance of the said requirements. Therefore, in such matters, it would be just and proper to leave the matter to the discretion and jurisdiction of the authority concerned in the event it finds that any breach is committed of the statutory provisions or the requisite guidelines and at that stage, the petitioning company may also have the defence/s, as may be available in law and the proceedings may be concluded in accordance with law and the sanction granted by this Court may not

operate as a bar to the concerned authority in initiation of the proceedings and/or conclusion thereof, merely because the existence of the transferor company has ended and/or the sanction is granted by this Court. Suffice it to observe that the matter may be independently decided, if such proceedings are initiated at the appropriate stage. The reference may be made to the decision dated 22.8.2007 of this Court in Company Petition Nos.62 and 63 of 2007 (**Well Pack Papers and Containers Limited – Petitioner)**.

11. The aforesaid shall take care of the objections as reported in the report of the OL. However, in view of the aforesaid observations read with the aforesaid decision of this Court, it may not be sufficient ground for this Court to decline the sanction, keeping all rights and contentions open to considered at the appropriate stage by the appropriate authority/ies as well as that of the concerned Company.

12. In response to the notice issued to the Central Government, Mr.P.L.Malik, Assistant Registrar of Companies has filed his affidavit raising objection based on the communication received by the Registrar of Companies vide letter dated 12.2.2007 from the Regional

Director, Company Affairs.

13. In response to the aforesaid additional affidavit is filed by Mr.Rajeev Reniwal, Director of the transferee company in Company Petition No.179 of 2006.

14. The first objection pertains to the latest financial statement, which has been filed together with the aforesaid affidavit and, therefore, the said objections would not survive.

15. The second objection pertains to pending NOC from Ahmedabad Stock Exchange and Saurashtra Kutch Stock Exchange, which as per the statement made in the affidavit together with the documentary proof produced thereof, no objection certificates are already issued by Ahmedabad Stock Exchange and Saurashtra Kutch Stock Exchange and, therefore, the same also would not survive.

16. The third objection pertains to non-utilisation of the authorised capital of the transferor companies and the requirement to comply with the provisions of Section 94/97 of the Act, would also not survive, because of the declaration made by the learned Counsel appearing for the petitioning Company that there is no clause in the scheme for the utilisation of the authorised capital of the

transferor companies.

17. In view of the above, subject to the aforesaid observations, all the petitions are allowed to the aforesaid extent.

18. The cost of the Assistant Solicitor General shall be paid by the petitioning Companies which is quantified at Rs.3,500/- for each petition. It will be open to the petitioning Companies to pay the cost directly to the counsel concerned by A/c. Payee cheque.

(Jayant Patel, J.)

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